

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MEGAN DOUGLAS, individually,	)	Case No. 3:18-cv-05451-BHS
	)	
Plaintiff,	)	<b>DEFENDANT NATIONAL</b>
	)	<b>RAILROAD PASSENGER</b>
v.	)	<b>CORPORATION'S MOTION FOR</b>
	)	<b>CLARIFICATION OF ORDER</b>
NATIONAL RAILROAD PASSENGER	)	<b>DENYING DEFENDANT'S MOTION</b>
CORPORATION d/b/a AMTRAK,	)	<b>FOR PROTECTIVE ORDER</b>
	)	
Defendant.	)	<b>NOTE ON MOTION CALENDAR:</b>
	)	<b>OCTOBER 31, 2018</b>

**I. RELIEF REQUESTED & INTRODUCTION**

Pursuant to LCR 7(h), Defendant National Railroad Passenger Corporation (Amtrak) respectfully moves for an order clarifying the Court's October 18, 2018 Order Denying Defendant's Motion for a Protective Order ("Order"). Amtrak recognizes that such motions are generally disfavored under the Court's local rules, but it nonetheless submits this motion because it believes clarification is required as to the scope of the Order and that such clarification will further the efficient conduct of this action consistent with the aims of Fed. R. Civ. P. 1 and LCR 26(f).

**II. FACTUAL BACKGROUND**

On October 18, 2018, this Court issued the Order, which denied Amtrak's request to limit discovery to compensatory damages issues. *See* Dkt. 22. This Court has now issued substantively identical orders in *Wilmotte v. NRPC*, 2:18-cv-00086-BHS, *Cates v. NRPC*, 3:18-

1 cv-05448, *Mitchem v. NRPC*, 3:18-cv-05366-BHS, *Rincon v. NRPC*, 3:18-cv-5415-BHS,  
 2 *Skyllingstad v. NRPC*, 2:18-cv-00648-BHS, and *Cottrell v. NRPC*, 3:18-cv-00072-BHS. The  
 3 Court has also granted Plaintiff's motions to compel and denied Amtrak's motions for protective  
 4 orders in *Goetz v. NRPC*, 2:18-cv-00093-BHS and *Harris v. NRPC*, 2:18-cv-00134-BHS.

5 As explained below, Amtrak respectfully requests clarification of the Order on two points  
 6 – (1) the Order's language referencing comparative fault and Consumer Protection Act ("CPA")  
 7 discovery and (2) the sequencing of punitive damages discovery.

### 8 **III. AUTHORITY & ARGUMENT**

#### 9 **A. Amtrak Requests Clarification of the Court's Order with Respect to Comparative 10 Fault and CPA Discovery**

11 The Court's order includes a brief reference to discovery on comparative fault and  
 12 Plaintiff's CPA claim. *See* Dkt. 22 at 3 ("[t]he same is true of Amtrak's attempt to limit discovery  
 13 related to comparative fault and Douglas's CPA claim."). Amtrak respectfully believes that the  
 14 clear record before the Court warrants clarification on this point.

##### 15 **1. Amtrak Previously Withdrew its Conditional Mitigation Defense**

16 First, Amtrak respectfully submits that the reference to comparative fault should be  
 17 stricken from the Order because Amtrak has unequivocally withdrawn its conditional  
 18 comparative fault defense in all DuPont derailment cases where it alleged that defense. *See, e.g.,*  
 19 Dkt. 17 at 2 ("Amtrak...withdraws [its conditional mitigation of damages] defense to remove  
 20 any doubt on this point."). Amtrak will, upon direction from the Court, file Amended Answers  
 21 without this defense if the Court would prefer Amtrak do so. Given that there are no fault-based  
 22 defenses in the case at all, Amtrak respectfully submits that the Court's reference to the existence  
 23 of such a defense in its ruling should be removed from the Order.

##### 24 **2. Plaintiff's CPA Discovery Should Be Limited in Scope**

25 Plaintiff is apparently basing her CPA injury theory on a claimed temporary deprivation  
 26 of funds. *See* Dkt. 15 at 9 (citing authorities for the proposition that a temporary deprivation of  
 27 funds is sufficient to support the CPA's injury element and claiming that Amtrak "concedes that

plaintiff has met the minimal private injury threshold”). Plaintiff does not dispute that Amtrak promptly refunded her ticket fare. *See id.* Given the apparently *de minimus* nature of Plaintiff’s claimed CPA injury, Amtrak respectfully submits that the CPA discovery allowed be limited in scope.

A private CPA claim has five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) a public interest impact; (4) an injury to the plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Amtrak will not contest elements (2) or (3) in this and any other DuPont derailment case in which a Plaintiff is currently asserting a CPA claim. Discovery on element (4) – the precise nature and amount of Plaintiff’s alleged injury – is in the exclusive possession of Plaintiff. Discovery with respect to elements (1) and (5) arguably includes information within the possession of both parties. Because Amtrak operates a number of routes across the country, only one of which is involved in this case, Amtrak’s discovery burden should be limited to discoverable information and materials related to its advertising and other public representations with respect to new service on the Point Defiance Bypass.

**B. Amtrak Respectfully Requests that the Court Clarify the Sequence of Punitive Damages Discovery**

The Court’s Order states: “Choice of law, however, is an issue in this case, and Douglas has shown that some authority exists for the Court to allow punitive damages under another jurisdiction’s law...To the extent punitive damages are an issue in this case, discovery related to this issue is relevant[.]” Dkt. 22 at 3. Amtrak submits that as presently written, the Order could be interpreted to allow discovery either (1) into the choice of law issue only or (2) the choice of law issue and substantive matters related to the underlying merits of this claim. Amtrak’s position is that the former interpretation is more consistent with the way the parties have presented the issue in their motions and the actual analysis required under Washington choice of law rules, and would save both parties an enormous amount of potentially unnecessary discovery

1 practice in the event that punitive damages are found to be unavailable based upon this Court's  
2 decision on the choice of law question.

3 In order for Plaintiff to successfully recover punitive damages in this case, she must clear  
4 two separate hurdles. First, Plaintiff must convince this Court that the law of a jurisdiction  
5 authorizing punitive damages applies to the punitive damages issue. Second, Plaintiff must meet  
6 the national standard applicable to punitive damages claims against Amtrak by its passengers  
7 established by 49 U.S.C. § 28103(a)(1). *See Williams v. Nat'l R.R. Passenger Corp.*, No. 2:12-  
8 CV-16-JD-PRC, 2013 WL 4788119, at \*5 (N.D. Ind. Sept. 9, 2013) (Indiana state law standard  
9 for award of punitive damages preempted by 49 U.S.C. § 28103). 49 U.S.C. § 28103(a)(1) states  
10 in relevant part:

11 [I]n a claim for personal injury to a passenger...arising from or in connection  
12 with the provision of rail passenger transportation... punitive damages, **to the**  
13 **extent permitted by applicable State law**, may be awarded in connection with  
14 any such claim only if the plaintiff establishes by **clear and convincing**  
15 **evidence** that the harm that is the subject of the action was the result of conduct  
16 carried out by the defendant with a **conscious, flagrant indifference to the**  
17 **rights or safety of others.**

18 (Emphasis added).

19 Amtrak and Plaintiff agree that Washington's "most significant relationship test" which  
20 incorporates the principles of the *decepage* doctrine, governs whether Plaintiff can clear the first  
21 hurdle. *See* Dkt. 9 at 7-11 (Amtrak's discussion of Washington's most significant relationship  
22 test); Dkt. 15 at 1, 9-10 (Plaintiff's assertion of viable punitive damages claims under *decepage*  
23 doctrine and argument for application of the choice of law principles set forth in cases applying  
24 Washington's "most significant relationship" test).

25 The first step of the most significant relationship test has four primary factors: (a) the  
26 place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c)  
27 the domicile, residence, nationality, place of incorporation and place of business of the parties;

1 and (d) the place where the relationship, if any, between the parties is centered. *Johnson v. Spider*  
 2 *Staging Corp.*, 87 Wn.2d 577, 580-581, 555 P.2d 997 (1976).<sup>1</sup>

3 As is often the case, the parties' disagreement over how the test should be applied centers  
 4 on factor (b) – the place where the conduct causing the injury occurred. *See* Dkt. 9 at 7-11; Dkt.  
 5 15 at 1, 9-10. As set forth in detail in the parties' briefing, Amtrak's view was that the existing  
 6 factual record was sufficient to establish that Washington state is where the relevant conduct  
 7 occurred, and Plaintiff's view was that she was entitled to further discovery on this issue because  
 8 Amtrak is headquartered in the District of Columbia. *See id.* Under the Court's Order, discovery  
 9 on this question will now move forward.

10 Where Amtrak requests clarification is with respect to the second hurdle, i.e., the  
 11 substantive aspect of Plaintiff's punitive damages claim. Amtrak is unclear as to whether the  
 12 Order requires it to respond only to discovery that would inform whether the law of another  
 13 jurisdiction should apply to the punitive damages issue, or whether the Order also contemplates  
 14 broad-ranging discovery on whether Amtrak's conduct rose to the heightened level required  
 15 under 49 U.S.C. § 28103(a)(1) for the imposition of punitive damages.

16 Amtrak believes there is good cause to conduct punitive damages discovery in two  
 17 phases, with the first phase directed solely toward the choice of law issues and a potential second  
 18 phase, if necessary, into the "merits" of Plaintiff's punitive damages claim after the choice of law  
 19 issue has been determined by motion practice.

20 // //

22 // //

24 // //

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26 <sup>1</sup> The second step is only considered if the four first-step factors are evenly balanced. *Bryant v. Wyeth*, 879 F. Supp.  
 27 2d 1214, 1220 (W.D. Wash. 2012). These potential "second step" factors are discussed in footnote 2 of Amtrak's  
 Motion for Protective Order, but should not be applicable given how heavily the first-step factors weigh in favor of  
 applying Washington's bar on punitive damages. *See* Dkt. 17 at 8, n.2.

IV. CONCLUSION

Amtrak respectfully seeks clarification of the Order as stated above.

DATED this 31st day of October 2018.

LANE POWELL PC

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of October 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. I hereby certify that the following document was sent to the following CM/ECF participant:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

DATED this 31<sup>st</sup> day of October 2018.

  
Sabrina Mitchell